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No. 86-132

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ALBERT NEUMANN, *et al.*,
Petitioners,

v.

REINFORCED EARTH COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Petitioners brought this action in the United States District Court for the District of Columbia, alleging that Respondent [1] had "monopolized" or "attempted to monopolize" by prosecuting a sham patent protest in the Patent and Trademark Office and related court litigation. The jury rejected the monopoly claim and a common law abuse of process claim, but found for Petitioners on the

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[1] Pursuant to Supreme Court Rule 28.1, Respondent Reinforced Earth Company (RECO) has no parent or subsidiary corporation. RECO is a 50% owner of "RECOSOL," a joint venture.

"attempt to monopolize" claim. Nonetheless, the trial court held the jury verdict on "attempt to monopolize" was not supported by the evidence.

In granting judgment for Respondent, the trial court held that Petitioners had failed to demonstrate that Respondent's conduct fell within the sham exception to First Amendment protection for access to the courts and federal agencies because (1) the litigation had been at least partially successful, App. at 22a,[2] and (2) there was no evidence that Respondent had prosecuted the protest with knowledge that its claims were without merit. App. at 21a. In addition, the court held that Petitioners lacked standing to bring an antitrust suit because Petitioners never possessed the resources or ability to begin marketing their product, App. at 26a-27a, and therefore were not injured by any action of Respondent.[3] Finally, the district court held that the "attempt to monopolize" claim could not be sustained by the evidence because of Petitioners' failure to demonstrate a dangerous probability of monopoly in the relevant market. App. at 24a.

Two points, not emphasized by the Petitioners, bear emphasis. *First*, the jury returned a verdict rejecting Petitioners' claim that Respondent had the power to control prices and restrict entry. *Second*, the jury was asked to return a series of special interrogatory answers with its verdict. Those interrogatory answers provided some assistance in interpreting the verdict on the issue of attempted monopolization. Using those special interrogatories as a guide, the district court found it evident that the jury had adopted precisely the definition of the

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[2] The decisions of the court of appeals and the district court are found in Petitioners' Petition for Writ of Certiorari ("Pet.") in Appendices B and C, herein referred to as "App."

[3] The court also held that Petitioners' damages proof was speculative as a matter of law. In so holding, the district court found a complete absence in the trial record of "any competent evidence upon which a damage calculation could be based." App. at 29a.

relevant market that *Respondent* had proposed. App. at 23a.

Under that definition of the relevant market, Petitioners had not sustained their burden of demonstrating that Respondent used sham litigation in an attempt to monopolize. Even assuming that Respondent had acted with some form of predatory intent, Respondent's actions nevertheless did not present a dangerous probability of monopoly, an established element to a charge of attempted monopolization. The district court, therefore, granted judgment notwithstanding the verdict to Respondent on the attempt to monopolize count. App. at 24a.

On appeal, Petitioners challenged each of the four independent bases supporting the district court's entry of judgment: specifically, the district court's conclusion that there had been no evidence to support a "sham litigation" challenge, that Petitioners lacked standing to maintain the action, that they had failed to demonstrate a dangerous probability of monopoly, and that their damages proof was incompetent as a matter of law. On the dangerous probability point now pressed in this Court, Petitioners raised various challenges to the district court's market analysis, eventually raising a procedural question about the district court's reliance on the jury's interrogatory answers, claiming that the layout of the special interrogatory form did not allow sufficient room to describe alternative markets.

The court of appeals declined to reach the sham litigation, standing or damages issues, each of which remains an independent basis for the district court's entry of a judgment notwithstanding the verdict. App. at 5a. The court of appeals found that legal deficiencies in Petitioners' market definition were alone sufficient to sustain the district court's judgment. App. at 13a. The appellate court had no difficulty recognizing that if the jury found

that the relevant market was simply "retaining walls"—as the jury stated in the special verdict form, as Respondent had proposed, as Respondent's experts had testified, as Petitioners initially conceded,[4] and as the trial judge concluded that the jury expressly found—then Petitioners had failed to demonstrate that Respondent's conduct presented a dangerous probability of monopoly: Respondent's share of that market was miniscule.[5] But concerned about the manner of evaluating the technical challenge to the layout of the interrogatory form, the court went on to find a more fundamental defect in Petitioners' "attempt to monopolize" theory. Even assuming that the trial court erred in relying on the jury's finding that the market was "retaining walls," or that *that* finding was improperly rendered, the court held that the alternative theories of the relevant market advanced by Petitioners were not legally viable on their own terms. App. at 11a-13a. It appears to be primarily this aspect of the court of appeals' opinion on which Petitioners focus their challenge.

REASONS FOR DENYING THE WRIT

This Petition raises no novel or important question of law, nor any issue upon which the courts of appeals have divided, nor upon which this Court has rendered directions contrary to those followed by the courts below. On the contrary, the judgment below is grounded firmly on well-established antitrust principles. It concerns only the case-specific issues of reconciling a jury verdict with the

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[4] In raising the issue in the circuit court, Petitioners took a position directly contrary to that taken in the district court, where Petitioners' counsel conceded that "the jury has chosen defendant's definition of the market." App. at 10a (citing Brief for Appellee at 39).

[5] The testimony was that the retaining wall market had sales of approximately $500 million, and that Respondent's total sales ranged from 1.8%-4.5% of this figure during the relevant period. App. at 10a.

absence of evidence that would support that verdict, and of reconciling special jury interrogatory answers with a verdict facially inconsistent with those interrogatory answers. The alleged error in interpreting the jury's findings, Pet. at 5-8, presents no issue of law, and does not raise the kind of issue that this Court generally reviews. Equally important, given the case-specific issue that Petitioners seek to raise, it is plain that the case was carefully and correctly decided below.

Although Petitioners intimate that the offense of "attempt to monopolize" requires "clarification," Pet. at 11, Judge Bork's opinion makes it clear that there is substantial unanimity of opinion on the principal characteristics of the offense. Among the uniformly recognized elements of the offense is that the predatory action in question must have created a "dangerous probability" that a monopoly would be achieved. The "dangerous probability" requirement was established by this Court more than eighty years ago in *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). The existence of this requirement of the offense is not challenged by Petitioners.

The rationale for that requirement is also relatively clear. Section 2 of the Sherman Act is concerned only with real or threatened monopolies. 15 U.S.C. § 2 (1982). Before it can be said that a competitor's act might result in a monopoly, that competitor must have some considerable significance in the market. *See* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 831 at 335-36 (1978). If it does not present a threat of monopoly—whatever the nature of the act alleged and whatever remedies may be afforded by other laws for such conduct—it is not something about which the federal courts are concerned under the Sherman Act. *See* App. at 9a.

Thus, before Petitioners can make out a case of attempt to monopolize, "the would-be monopolist must possess 'a measure of power in the relevant market.'" App. at 8a

(quoting 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 831 at 336). Absent the most exceptional circumstances, the potential power to monopolize could not realistically be present absent some meaningful market share. Indeed, it is uniformly recognized that market power is determined, at least in large measure, by the share of the market held. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). It was on these shoals that Petitioners' claim necessarily foundered.

As Judge Bork noted, Professors Areeda and Turner have concluded that a market share of less than 30% is presumptively inconsistent with any suggestion that a competitor will, through his anticompetitive acts, make a monopoly "dangerously probable." App. at 8a. The cases and other commentators agree that a competitor with minimal market share poses no threat of monopoly as a matter of law. *See Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1368-69 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), 16B J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.01[2] (1986); *cf., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 216-17 (D.C. Cir. 1986). The less than 5% that Respondent held in the market apparently chosen by the jury was not close to the threshold market share.

But even if some alternative market proposed by Petitioners had been chosen by the jury, the verdict could not stand. Petitioners' two proffered definitions were not legally viable and, therefore, Petitioners failed in their well-recognized burden of demonstrating power in the relevant market by a preponderance of the evidence. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965); *American Bearing Co. v. Litton Indus.*, 729 F.2d 943, 949 (3d Cir.), *cert. denied*, —— U.S. ——, 105 S. Ct. 178 (1984). The first choice of

Petitioners, "retaining walls in all federal and state highway projects where Reinforced Earth is specified as a sole product or alternate," App. at 11a, was "arbitrarily circumscribed," App. at 12a, because the proposed market merely counts successes (when Respondent was permitted to bid) and ignores failures (when it was not allowed to bid[6] or did not even know of the competition). Judge Bork aptly summarized the state of the record by concluding that "[i]t makes no sense to say that an entrant with a new technology has monopoly power by defining the market as those customers whom the entrant has so far managed to persuade." App. at 12a. Accordingly, the market share data created by this definition was meaningless. *See, e.g., Jayco Systems v. Savin Business Mach. Corp.*, 777 F.2d 306, 319-20 (5th Cir. 1985); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 487-89 (5th Cir. 1984).

The final alternative suggested by Petitioners—retaining walls over 20 feet—was equally unavailing, for in this market Petitioners had failed to offer any evidence whatsoever of Respondent's share of the market. The failure to offer any evidence of market share is well-established as a failure to meet the burden of proof imposed by the cases on a plaintiff presenting an "attempt to monopolize" theory. App. at 13a. *See Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 161-62 (10th Cir. 1986); *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432, 436-37 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276, 284-86 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *E.J. Delaney Corp. v.*

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[6] One of Petitioners' own witnesses, for example, testified that systems of Respondent's general type "will not be broadly accepted for another five to 15 years." App. at 12a (citing Brief for Appellants at 18).

Bonne Bell, Inc., 525 F.2d 296, 306-07 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

Significantly, Judge Bork disdained absolute reliance on the market share theory and proof of market share, leaving open alternative avenues of proof of market power. App. at 13a. But the only alternative avenue of proof cited by Petitioners—the alleged proof that Respondent could control prices and restrict entry, Pet. at 9—was inconsistent with the jury's special findings: the jury expressly found that Petitioners did *not* have this power. App. at 13a (citing Appellants' Record Excerpts at 70). With respect to *this* jury finding, Petitioners could not make the argument that the layout of the jury form did not allow the jury adequately to express itself.

Petitioners point out that whereas the offense of monopolization requires the power "to control prices and exclude competition," the offense of attempted monopolization does not. In this regard, Petitioners argue that the court below erred in holding that only if a competitor has achieved the power to control prices and exclude competition can it be guilty of the offense of *attempted monopolization.*

The court of appeals did not make the error of which it is accused. The court of appeals implicitly recognized that a market share less than that required to "monopolize" would suffice for the offense of attempt. And it even recognized that under some circumstances, no proof of market share might be required. The court merely held that in the circumstances of this case, those special conditions were not present. App. at 13a. The court of appeals' only reference to the "ability to control price and exclude competition," App. at 13a, was in reference to *Petitioners' own contention* that it had established that Respondent had that power, and that Petitioners were thereby relieved of the burden of showing that Respondent had a significant market share. It was only to respond

to Petitioners' ineffectual choice of alternative theories that the court was required to make reference to the jury interrogatory on the ability to "control price and exclude competition." App. at 13a. The court below did not fail to appreciate the distinction between "monopolization" and "attempt to monopolize."

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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